

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

POWERTRAIN, INC., a Mississippi corporation

PLAINTIFF

v.

CIVIL ACTION NO. 1:11-CV-00105-GHD-DAS

JOYCE MA, individually; and

BEST MACHINERY & ELECTRICAL, INC.

DEFENDANTS

**ORDER DENYING THIRD-PARTY DEFENDANTS' MOTION TO DISMISS AND
GRANTING LEAVE TO FILE AMENDED THIRD-PARTY COMPLAINT**

Presently before the Court is a motion to dismiss [57] filed by Third-Party Defendants William H. Shawn and ShawnCoulson, LLP (the "Third-Party Defendants"). Third-Party Plaintiff Joyce Ma (the "Third-Party Plaintiff") has filed a response requesting that the Court deny the motion and grant her leave to amend her third-party complaint. Upon due consideration, the Court finds that the Third-Party Defendants' motion to dismiss [57] should be denied and the Third-Party Plaintiff's request for leave to amend her complaint should be granted.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint when the plaintiff has failed to state a claim upon which relief can be granted. However, such motions "are viewed with disfavor and are rarely granted." *Kocurek v. Cuna Mut. Ins. Soc'y*, 459 F. App'x 371, 373 (5th Cir. 2012) (citing *Gregson v. Zurich Am. Ins. Co.*, 322 F.3d 883, 885 (5th Cir. 2003)). "Rule 15(a) of the Federal Rules of Civil Procedure requires a trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend." *See Sims v. Carrington Mortg. Servs., L.L.C.*, --- F. App'x --, 2013 WL 4083287, at *2 (5th Cir. Aug. 14, 2013) (per curiam) (quoting *Jones v. Robinson Prop. Grp.*, 427 F.3d 987, 992 (5th Cir. 2005) (internal quotation marks omitted)). "[D]istrict

courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.” *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

The Court finds that leave to amend should be granted to the Third-Party Plaintiff in this case, but the Court cautions that to survive a subsequent Rule 12(b)(6) motion to dismiss, the Third-Party Plaintiff’s complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when the pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). “[P]laintiffs must allege facts that support the elements of the cause of action in order to make out a valid claim.” *Webb v. Morella*, No. 12–30617, 2013 WL 1490654, *2 (5th Cir. Apr. 12, 2013) (per curiam) (quoting *City of Clinton v. Pilgrim’s Pride Corp.*, 632 F.3d 148, 152–53 (5th Cir. 2010)). “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Id.* (quoting *Fernandez–Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993)). “Threadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. In addition to meeting these requirements, the circumstances of a fraud claim must be pled with particularity. FED. R. CIV. P. 9(b). “[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.” *Williams v. WMX Techs.*, 112

F.3d 175, 177 (5th Cir. 1997) (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)). “Put simply, Rule 9(b) requires ‘the who, what, when, where, and how’ to be laid out.” *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (citing *Williams*, 112 F.3d at 179).

Accordingly, it is ORDERED that the motion to dismiss [57] filed by Third-Party Defendants William H. Shawn and ShawnCoulson, LLP is DENIED, and it is further ORDERED that Third-Party Plaintiff Joyce Ma must file her amended complaint within fifteen (15) days of the date of this Order.

It is SO ORDERED, this, the 24th of September, 2013.



SENIOR JUDGE